

# The Corporate Veil in the Case Law of the European Court of Human Rights

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## 1. Introduction: Shareholder Applications, the “Victim” Requirement and the “Rigidity” of Barcelona Traction

Separate juristic personhood is a salient feature and function of the limited liability company. The separation of the company and its shareholders is one aspect of the maxim of the corporate veil: it commands that their respective spheres cannot be identified for purposes of law.<sup>1</sup> The transposition of the limited liability company and the company veil – both originally creations of municipal law – to the international legal plane is a well-known and contentious topic in international legal discourse. The International Court of Justice in its 1970 *Barcelona Traction* judgment notoriously upheld the distinctiveness of corporate personhood for the purpose of diplomatic protection.<sup>2</sup> Subsequent developments in international treaty law and practice have greatly alleviated the problems for shareholder investors caused by the “rigidity” of *Barcelona Traction*.<sup>3</sup> It has therefore become unfashionable to apply (or for that matter to analyse) the *Barcelona Traction* maxim in international legal doctrine.

Curiously, perhaps, what may be somewhat imprecisely referred to as the doctrine of the corporate veil, as confirmed by the ICJ in 1970, prevails in the European Convention on Human Rights.<sup>4</sup> This Convention offers a comprehensive arrangement for the protection of companies’ and shareholders’ civil and political rights.<sup>5</sup> ECHR Article 34, which lays down the most important criteria for a pri-

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<sup>1</sup> For the issue in English company law, see P L Davies (ed.), *Gower’s Principles of Modern Company Law* (6<sup>th</sup> ed.), London 1997, 86.

<sup>2</sup> Case concerning the *Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain, 1970)* (merits) ICJ Reports 1970, 3.

<sup>3</sup> Richard B Lillich, *Two Perspectives on the Barcelona Traction Case*, 65 *American Journal of International Law*, 522, (1971), early referred to the judgment as “rigid” in its assessment of shareholder needs. A representative view of the *Barcelona Traction* holding’s status in contemporary international law is given in Robert Jennings/Arthur Watts (eds.), *Oppenheim’s International Law*, (vol. 1, 9<sup>th</sup> ed.), London 1992, vol. 1, 517-522 and vol. 2, 859-864.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950, 213 UNTS 221, ETS 5 (hereinafter “the ECHR” of “the Convention”).

<sup>5</sup> See, e.g., Michael K Addo (ed.), *The Corporation as a Victim of Human Rights Violations, in: Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague 1999, 187; and Marius Emberland, *Duality and Ambiguity. The Protection of Corporations’ Interests*

vate application to be considered on its merits by the European Court of Human Rights, states *inter alia* that the right for a private person to institute proceedings against a signatory state is granted to “any person, non-governmental organization or group of individuals”. A great variety of business entities and their constituents, limited liability companies and their shareholders included, are among those persons entitled to seize the Court.<sup>6</sup>

An application will, however, only be found admissible if the applicant is personally regarded as a “victim” of a violation of the Convention. A “victim” in the meaning of Article 34 “denotes the person directly affected by the act or omission which is in issue”.<sup>7</sup> The “victim” requirement has caused considerable debate in the Court as far as one particular form of shareholder-submitted applications is concerned, notably applications in which a shareholder – for various motivations – applies to the Court concerning measures that have been taken initially against the company’s legal sphere rather than that of its shareholder.<sup>8</sup> Is the “victim” requirement, with its insistence on direct and personal affection for the applicant person, satisfied when shareholders submit claims for identification with their company?

The construct of separate corporate personality in municipal law implies that this type of complaint is problematic because the corporate veil presupposes a fundamental distinction between shareholder rights, which belong to the shareholder directly,<sup>9</sup> and shareholder interests in the company, which are not thought of as pertaining to the shareholder person but rather the company as such.<sup>10</sup> When

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under the European Convention on Human Rights, Norwegian Institute of Human Rights, Human Rights Reports, 1, (2001).

<sup>6</sup> The empirical material has shaped the present article’s sole focus on a shareholder model of the company form, on limited liability companies among all kinds of business entities, and on the discussion of the corporate veil in particular as it is undertaken with regard to Article 34’s “victim” requirement. Case law concerning related matters is yet too sparse to provide sufficient ground for analysis.

<sup>7</sup> *Eckle v. Germany*, judgment 15 July 1982, Series A 41 § 66(1). On the “victim” requirement generally, see Jochen Abr Frowein, *La notion de victime dans la Convention Européenne des Droits de l’Homme*, in: *Studi in onore di Giuseppe Sperduti: fonti internazionali e rapporti fra ordinamenti, l’individuo nel diritto internazionale, altri contributi*, Milan 1984, 585; and Kersten Rogge, *The “Victim” Requirement in Article 25 of the European Convention on Human Rights*, in: Frantz Matscher/Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J. Wiarda*, Cologne 1988, 539.

<sup>8</sup> The case law suggests that shareholders file applications of this kind either because they misunderstand the meaning of “victimhood”; because they believe that applications submitted by several company constituents enhance the chances of admissibility; because they believe they represent identical interests as those of the company, because they think that they, too, have suffered a direct violation; because the corporate entity cannot itself take care of its own affairs; or because the company disagrees with the shareholder on the appropriateness of initiating Strasbourg litigation.

<sup>9</sup> Shareholder complaints in which their property rights or direct shareholder rights allegedly have been affected naturally satisfy the “victim” requirement because these rights pertain to the applicant person directly. Examples include Application No 30417/96, *Olczak v. Poland*, admissibility decision 7 November 2002 (unreported); *Sovtransavto Holding v. Ukraine*, judgment 26 July 2002 (unreported); and *Pafitis and Others v. Greece*, judgment 26 February 1998, Reports 1998-I.

<sup>10</sup> On the distinction in municipal law, see, Manuel Díez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, (1974-I) 141 *Recueil de Cours* 87, 155; and *Barcelona Traction*, *supra* note 2, 33 (§ 37 last sentence) and 35 (§ 44).

shareholders complain of violations that have befallen their company's rights rather than their own rights as shareholders, they are essentially asking to be protected for measures taken against a person other than themselves. On the other hand, the Court has held that the "victim" requirement signifies an autonomous concept: it is to be interpreted independently from municipal legal arrangements.<sup>11</sup> The Court also takes cognisance of the principle of effective ECHR protection when it interprets the requirement, which, among other things, suggests a negation of adjudication based on deductions from theoretical concepts and categorisations.<sup>12</sup> The Court has even developed a doctrine of "indirect victimhood", which, although not habitually linked with the corporate veil debate, illustrates a possibility under the Convention to adopt a pragmatic approach to the "victim" requirement when the Court thinks that international denunciation is apposite regardless of the formal barriers otherwise inherent in Article 34.<sup>13</sup>

In responding to shareholders' claims to be identified with their company for the purpose of the "victim" requirement, however, the European Court of Human Rights, an international court, which, through its reliance upon effective interpretation, proclaims itself as an advocate of pragmatic reasoning, builds on and indeed refers to the non-identification principle of *Barcelona Traction*. A reiteration by the Strasbourg Court of a maxim of international law that is recurrently lamented for its "rigidity" and unnecessary formalism does seem puzzling. Does the reiteration of *Barcelona Traction* really reflect the international law anomaly it seemingly conveys?

This article identifies and explains the construction of the corporate veil in the case law of the European Court of Human Rights with particular regard to the interpretation of the "victim" requirement in Article 34 of the Convention. Part 2 introduces the principle of non-identification in the case law of the Court. Part 3 presents the exceptions to this principle. Part 4 seeks to understand the motivations for the Court's approach. Part 5 offers some summary observations.

## 2. The Agrotexim Principle of Non-identification

Today, the Court responds fairly consistently to shareholders' identification claims for the purpose of the "victim" requirement in Article 34. The road towards clarification has however been long and winding since the Commission's first encounter with the issue in 1966.<sup>14</sup> The current Strasbourg construction of the corporate veil is based on the Court's 1995 judgment in the case of *Agrotexim Hellas SA*

<sup>11</sup> Application No 28202/95, *Middelburg, van der Zee and Het Parool B.V. v. Netherlands*, admissibility decision 21 October 1998 (unreported), § 1(3) is a recent authority.

<sup>12</sup> *Airey v. Ireland*, judgment 9 October 1979, Series A 32 § 24(2), and Pieter van Dijk/GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague 1998, 74.

<sup>13</sup> See, e.g., van Dijk/van Hoof, *supra* note 12, 56-58 and 74-76.

<sup>14</sup> Application No 1706/62, *X. v. Austria*, admissibility decision 4 October 1966, (1966) 21 CD 34.

*and Others v. Greece*.<sup>15</sup> An introduction to the facts of the case helps to understand the issues at stake when the corporate veil is under scrutiny in Strasbourg.

### (a) The Agrotexim Dispute

The applicants of the case, six Greek limited liability companies, were shareholders in Karolos Fix Brewery (Fix), of whose capital stock the applicants jointly held slightly more than a 51% share ownership. Heavily in debt to the National Bank of Greece, Fix's general meeting decided to wind up the company. A few months later the Greek government ordered the liquidation of Fix under a special procedure which allowed for the appointment of one liquidator representing the National Bank of Greece and one representing the company's management. The Strasbourg complaint arose after Fix suffered financial ruin allegedly because the municipal council of the city of Athens showed sustained but informal interest in expropriating two of Fix's factory plants in central Athens: this public involvement disenchanted potential investors in the development venture envisaged by the faltering company. The applicants contended before the Court that their rights under P1 Article 1 (protection of possessions) and Articles 6 and 13 (procedural guarantees) had been violated because domestic courts did not support their contention of a *de facto* expropriation of the company's assets.<sup>16</sup>

### (b) The Commission's Accommodating View

The Court's construction of the corporate veil cannot be understood completely without seeing it in the light of the view previously held in the same case by the European Commission of Human Rights, which at the time was entrusted with the task of screening the admissibility of applications. In its report, the Commission had held that the shareholders were indeed "victims" of the measures taken against Fix. The Commission emphasised that the shareholders had "an interest in the subject matter of the application" and that Fix because of its situation as debtor and its special liquidation scheme had been "under effective State control" since its liquidation.<sup>17</sup>

Although a certain amount of flexible construction of the corporate veil had been foreshadowed by previous Commission cases,<sup>18</sup> the Commission in the *Agrotexim* application arguably went quite far in developing a shareholder-friendly approach. The majority of the Court (eight of nine judges) objected in particular to the following statement by the Commission:<sup>19</sup>

<sup>15</sup> *Agrotexim Hellas SA and Others v. Greece*, judgment 24 October 1995, Series A 330-A.

<sup>16</sup> The facts of the case are presented in *Agrotexim v. Greece*, *supra* note 15, §§ 6-38.

<sup>17</sup> Application No 14807/89, *Agrotexim Hellas SA and Others v. Greece*, report 10 March 1994.

<sup>18</sup> *X. v. Austria*, *supra* note 14; and Application No 7598/76, *Kaplan v. United Kingdom*, report 17 July 1980, (1980) 21 DR 5, 23 (§ 130).

<sup>19</sup> *Agrotexim v. Greece*, *supra* note 15, §§ 63-64.

The Commission notes that the applicant's rights at issue are their rights as majority shareholders in the company Karolos Fix Brewery SA. The measures complained of were directed against the company but also indirectly affected the applicant's rights. Consequently, insofar as there has been an interference with the company's property rights, this interference *must* be considered to extend to the applicants' property rights as well.<sup>20</sup>

The Court considered that this amounted to a default rule of identification.<sup>21</sup> It admonished the Commission's willingness to let considerations of equity take precedence over the formal barrier represented by the corporate veil; it expressly dismissed the emphasis on the "specific circumstances of each case" and that the applicants had a "personal interest in the subject-matter of the complaint".<sup>22</sup> Observing that the applicants did not complain of infringements with their shareholding rights but of "the alleged violation of the Brewery's right to the peaceful enjoyment of its possessions had adversely affected their own financial interests because of the resulting fall in the value of their shares", the Court saw the claim as one in which the shareholders "sought to have the company's corporate veil pierced in their favour".<sup>23</sup>

### (c) The Agrotexim Principle of Non-identification

The Court considered the approach taken by the Commission an inadvisable interpretation of Article 34. For its own part, it took as its starting point the fundamental distinction in municipal law between shareholder rights and shareholder interests,<sup>24</sup> and observed that:

... the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.<sup>25</sup>

This statement clearly suggests that a shareholder cannot in principle be identified with its company for the purpose of the "victim" requirement. It is not sufficient that damage done to the company recoils on the shareholder. He will not be regarded as a "victim" unless his own rights, as shareholder, have been directly affected. This statement, found in § 66 of the judgment, is for the sake of convenience referred to henceforth as the *Agrotexim* principle of non-identification.

The *Agrotexim* principle shows that the Court upholds the principle of non-identification laid down by the ICJ in *Barcelona Traction* in a different, albeit re-

<sup>20</sup> *Agrotexim Hellas SA and Others v. Greece*, supra note 17, § 59 (emphasis added) (two of 15 Commission members dissented; see Dissenting Opinion of Sir Basil Hall and Mrs Liddy).

<sup>21</sup> *Agrotexim v. Greece*, supra note 15, § 64.

<sup>22</sup> *Agrotexim v. Greece*, supra note 15, § 63.

<sup>23</sup> *Agrotexim v. Greece*, supra note 15, § 62.

<sup>24</sup> *Agrotexim v. Greece*, supra note 15, § 62. The distinction was elucidated in *Olczak v. Poland*, supra note 9, § 59.

<sup>25</sup> *Agrotexim v. Greece*, supra note 15, § 66.

lated, context. *Barcelona Traction* had also held that only in exceptional circumstances would the court accept that it, for determining national affiliation of the company, could look beyond the corporate person and regard the true nationality of its shareholders.<sup>26</sup> In fact, the *Agrotexim* Court explicitly relied on *Barcelona Traction's* endorsement of the corporate veil, when it stated that the principle of non-identification "has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice (in *Barcelona Traction*) paras. 56-58 and 66".<sup>27</sup>

#### (d) The Substantive Reach of *Agrotexim*

The *Agrotexim* principle has been reiterated in subsequent Strasbourg case law, as will become clear as the present article proceeds. It is even adopted with regard to identification claims submitted by constituents other than shareholders.<sup>28</sup> Non-identification is unquestionably the starting point and general rule when the Court interprets the "victim" requirement in Article 34.

However, as the non-identification principle was developed in the context of P1 Article 1 (protection of property), it seems relevant to ask whether the company veil also bars identification when a shareholder claims protection under other Convention rights.<sup>29</sup> To this question the case law offers no unambiguous answer.

Some decisions suggest that the principle is confined to P1 Article 1, because the Court refers to the *Agrotexim* statement only as far as admissibility under P1 Article 1 is concerned, while claims for protection under other provisions fail to mention *Agrotexim* as evidence for lack of "victimhood".<sup>30</sup> This may suggest that the special character of property protection and the element of investment risk inher-

<sup>26</sup> *Barcelona Traction*, *supra* note 2, §§ 56-58 and § 66. The two exceptions acknowledged as permissible by the court were the demise of the corporate structure or, alternatively, the company's home state's inability to assert protection on the company's home state. Finally, the protection of interests may be asserted by way of diplomatic protection regardless of nationality if the case involves grave human rights violations amounting to *jus cogens*, thus enabling an obligation *erga omnes* under international law, see *ibid*, § 91.

<sup>27</sup> *Agrotexim v. Greece*, *supra* note 15, § 66. The Court was not obliged to rely on the ICJ's judgment. There are significant structural differences between the two contexts presented in the respective judgments. Such issues are not considered here.

<sup>28</sup> Application No 39011/97, *Société Générale d'Investissement (SGI) and Others v. France*, admissibility decision 4 May 1999 (unreported), (claim for identification between companies within the same corporate group); Application No 57313/00, *Farbers and Harlanova v. Lithuania*, admissibility decision 6 September 2001 (unreported), (manager seeking identification with company); and Application No 37398/89, *CDI Holding AG and Others v. Slovakia*, admissibility decision 18 October 2001 (unreported), (board directors seeking identification).

<sup>29</sup> Alan J Dignam/David Allen, *Company Law and the Human Rights Act 1998*, London 2000, 183, describes the principle's applicability outside P1 Article 1 as "uncertain".

<sup>30</sup> *CDI Holding AG and Others v. Slovakia*, *supra* note 28, § 4; see also *Agrotexim v. Greece*, *supra* note 15, § 73(2). See also the contention of the Commission in *Neves e Silva v. Portugal*, judgment 24 April 1989, Series A 153-A, § 38 (uncommented by the Court), Application No 20471/92; *Kustannus Oy Vapaa Ajattelija AB and Others v. Finland*, admissibility decision 15 April 1996; and Application No 51578/99; *Keslasy v. France*, admissibility decision 8 January 2002 (unreported).

ent in holding shares as property command a distinct approach to claims of identification. When shareholders complain of violations of other ECHR provisions, they do not necessarily complain of direct infringements of their financial interests. Other considerations may apply when non-property related provisions are at stake, such as the significance of the rule of law principle (on which the Convention also builds) of protecting fundamental procedural guarantees as those contained in Article 6(1).

Other decisions favour an extended reach of *Agrotexim*. In *J.W. v. Poland*, the Commission decided on the admissibility of a complaint filed by a shareholder that his rights under Article 6 had been violated because of the circumstances surrounding legal proceedings to which only the company had been a party. Finding that the individual could not be regarded as a “victim”, the Commission cited the *Agrotexim* principle, yet observed that it applied “in particular in respect of complaints under Article 1 of Protocol No. 1”.<sup>31</sup> The statement suggests that P1 Article 1 is the principle’s core, but that it can apply to other provisions also. Significantly, the Court in its two most recent considerations on the merits of a corporate veil claim, in *G.J. v. Luxembourg* of 2000 and in *Credit and Industrial Bank and Moravec v. the Czech Republic* of 2003, the Court cited *Agrotexim* as the prevailing formula for deciding on the admissibility of claims which concerned Article 6(1).<sup>32</sup>

This incoherence is not too significant. In cases in which the principle is not reiterated the Court nonetheless upholds the “victim” requirement’s essential condition that the applicant must be “directly affected” by the measure. As regards Articles 6 and 13 complaints, for instance, this is generally taken to mean that the applicant must personally have been party to the contested judicial proceedings. As will be explained below, it is also instructive to see the Court’s response, regardless of a formal application of *Agrotexim*, as being shaped by a set of recurrent factors and the facts of every case.

### 3. Identification in Exceptional Circumstances

Although the Court in *Agrotexim* dismissed the comprehensive “veil piercing” approach taken in the Commission’s report, it did not rule out shareholders’ entitlement to protection against measures formally taken against their company. On the contrary, it conceded that identification was allowed in “exceptional circumstances”.<sup>33</sup> The Court thereby effectively endorsed significant portions of an extant jurisprudence in which shareholders had been found sufficiently affected by inter-

<sup>31</sup> Application No 27917/95, *J.W. v. Poland*, admissibility decision 11 September 1997 (unreported).

<sup>32</sup> *G.J. v. Luxembourg*, judgment 26 October 2000 (unreported), §§ 23-24; and *Credit and Industrial Bank and Moravec v. the Czech Republic*, judgment 21 October 2003 (unreported), §§ 50-51. See also *S.G.I. and Others v. France*, *supra* note 28; and Application No 43798/98; *Matrot SA and Others v. France*, admissibility decision 3 February 2000 (unreported).

<sup>33</sup> *Agrotexim v. Greece*, *supra* note 15, § 66.

ferences with the company's rights to enable them to be identified with the corporate entity. *Agrotexim* suggests that identification be permitted in two types of instances, each with a distinct doctrinal history. They are introduced in turn. The Court seems to refer to these exceptions in a terminological mode which may be referred to as "veil piercing". The exceptions mentioned below are not necessarily matters of "veil piercing" in its original meaning. The narrative follows the Court's choice of terminological mode for the sake of simplicity.

### (a) Impossibility for the Company to Apply to the Court

The first exception can be referred to as the "impossibility" approach. In *Agrotexim*, the Court acknowledged that the "piercing of the 'corporate veil' ... will be justified ... where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators".<sup>34</sup> This form of legitimate identification resembles the main ground for identification suggested by the ICJ in *Barcelona Traction*, where "legal demise of the company" was required for shareholding to take precedence over corporate personhood.<sup>35</sup>

The criteria for identification under this exception are strict and strictly applied: the judgment refers to "impossibility" for the company itself to take procedural steps before the Court. The impossibility must be "clearly established". The Court also maintained, presumably as a guiding norm, that "impossibility" will occur most easily when the applicant company has ceased its legal personality altogether.<sup>36</sup> The applicants in *Agrotexim* complained of measures affecting a company under a liquidation procedure in which one of the two liquidators, who were required to act in concert, represented Greek authorities. From a public/private divide viewpoint, it is not entirely unlikely – or so it was at least surmised in the Commission's report – that the state appointed liquidator would refuse to take action against the municipal authorities of Athens, another (albeit local) part of the Greek state.<sup>37</sup> The Court, however, thought it had been at least theoretically "possible" for Fix, through its liquidators, to act against the city of Athens had it so wanted. Failing such procedural steps, the "impossibility" requirement was not satisfied and the shareholders' intervention was deemed inadmissible.<sup>38</sup>

<sup>34</sup> *Agrotexim v. Greece*, *supra* note 15, § 66. The Commission applied a similar requirement – "incapability" – in Application No 9266/81; *Yarrow PLC and Others v. United Kingdom*, admissibility decision, 28 January 1983, (1983) 31 DR 155; Application No. 11189/84; *Company S. and T. v. Sweden*, admissibility decision 11 December 1986, DR 50 121, 136; and Application No 13013/87; *Wasa Liv Ömsesidigt and Others v. Sweden*, admissibility decision 14 December 1988.

<sup>35</sup> *Barcelona Traction*, *supra* note 2, 41 (§ 66).

<sup>36</sup> *Agrotexim v. Greece*, *supra* note 15, § 68 "had not ceased to exist as a legal person".

<sup>37</sup> Cf. the Commission's emphasis on the company being "under effective state control", *supra* note 17.

<sup>38</sup> *Agrotexim v. Greece*, *supra* note 15, §§ 68-72.

**(b) The Company as a Mere Vehicle for Shareholders' Business Undertakings**

The second form of "exceptionality" (if keeping with the terminology of *Agrotexim* § 66) might be called the "mere vehicle" approach. It was not reiterated in *Agrotexim*. Yet, the *Agrotexim* Court did not exclude the prospect that other "exceptional circumstances" could justify a disregard of separate corporate personality; it merely referred to impossibility "in particular".<sup>39</sup> In fact, in its dismissal of the Commission's identification approach there is nothing to suggest that the Court intended to dismiss another tradition of identification disassociated with corporate demise.<sup>40</sup>

The Court confirmed the "mere vehicle" approach in 1991 in *Pine Valley Developments Ltd and Others v. Ireland*.<sup>41</sup> The Court identified the legal positions of a limited liability company (Pine Valley), its sole shareholder (Healy Holding Ltd) and the latter holding company's sole shareholder (Mr Healy), although only Pine Valley had formally been involved in the contested dispute. The complaint concerned allegations of unjustified government control over Pine Valley's property in violation of P1 Article 1.<sup>42</sup> Healy Holding and Mr Healy had not been party to the domestic proceedings, but they owned 90 % of Pine Valley's capital stock. Mr Healy, through Healy Holding, personally controlled the company in question. The Court accepted all applicants as "victims" because

Pine Valley and Healy Holdings were no more than vehicles through which Mr Healy proposed to implement the development for which outline planning permission had been granted. On this ground alone it would be artificial to draw distinctions between the three applicants as regards their entitlement to claim to be "victims" of a violation.<sup>43</sup>

This approach accepts veil piercing when the company in question, formally the person whose rights have been interfered with, is the vehicle for the applicant shareholders' business ventures. It favours substance over form for the benefaction of business owners' interests.

**(c) Exceptionality Depends on an Overall Assessment of the Facts of Each Case**

The reiteration in later decisions of the *Agrotexim* principle of non-identification<sup>44</sup> and its two exceptions<sup>45</sup> attests to their central role in identifying the Court's

<sup>39</sup> *Agrotexim v. Greece*, *supra* note 15, § 66.

<sup>40</sup> *Agrotexim v. Greece*, *supra* note 15, §§ 62-64.

<sup>41</sup> *Pine Valley Developments Ltd and Others v. Ireland*, judgment 29 November 1991, Series A 222. It was originally developed in the Commission's case law. In Application No 12742/87, *Pine Valley Developments Ltd and Others v. Ireland*, admissibility decision 3 May 1989, the Commission accepted identification by relying on *Kaplan v. United Kingdom*, *supra* note 18, which again builds on *X. v. Austria*, *supra* note 14.

<sup>42</sup> *Pine Valley v. Ireland*, *supra* note 41, §§ 35-37.

<sup>43</sup> *Pine Valley v. Ireland*, *supra* note 41, § 42.

<sup>44</sup> For Court cases, see *G.J. v. Luxembourg*, *supra* note 52, § 23; and Applications No 37196/97; *Paparatti and Others v. Italy*, admissibility decision 1 June 1999; *Matrot SA and Others v. France*, *supra* note 32; *CDI Holding AG and Others v. Slovakia*, *supra* note 28; *Keslassy v. France*, *supra* note

response to shareholder claims for identification. But it would be incorrect to conclude from this observation that the Court ignores a careful tailoring of principled approaches to the specific circumstances of each case. It is not likely that the Court sees itself as being unconditionally bound by any particular “principle” (or exceptions to it) although it subscribes to such devices as guiding principles. The Strasbourg Court is presumably not different from other courts in subscribing to a pragmatic outlook under the pretence of formalism.<sup>46</sup>

The inescapable element of flexibility in adjudication is evident in the *Agrotexim* judgment itself. When the Court discussed the “possibility” for Fix’s liquidators to take action, it observed that there were no indications that they “failed to perform their duties satisfactorily. On the contrary, there is sufficient evidence to show that they took all the measures that they considered to be in the interests of the insolvent company’s assets”.<sup>47</sup> The applicant shareholders’ neglect to propose the removal of the liquidators for alleged malperformance was also taken into account.<sup>48</sup> In the midst of the disagreement in *Agrotexim* between the Court and the Commission’s report, it is all in all easy to forget that the Court did not object to the views previously held by the Commission in its original admissibility decision, where it had observed that a shareholder’s “victimhood”:

... cannot be determined on the sole criterion of whether the shareholder detains the majority of the company shares. This element is an objective and important indication but other elements may be relevant in view of the circumstances of each particular case.<sup>49</sup>

Case law informs us that some factors are recurrent in the Court’s assessment of the possibility of “lifting the corporate veil” for Article 34 purposes.

The Court is for instance inclined to consider the degree of shareholding influence exerted by the applicant in the company in question. The less substantial ownership held by the applicant shareholder, the less likely will the Court retreat from its non-identification approach.<sup>50</sup> The Court is obviously also entitled

30. The Commission relied on *Agrotexim* in *J.W. v. Poland*, *supra* note 31; Application No 30381/96, *Mironov v. Bulgaria*, admissibility decision 23 October 1997; Application No 24463/94, *Penton v. Turkey*, admissibility decision 14 April 1998; and Application No 29010/95, *Credit and Industrial Bank and Moravec v. Czech Republic*, admissibility decision 20 May 1998.

<sup>45</sup> See, e.g., Application No 35178/97, *Ankarcrona v. Sweden*, admissibility decision 27 June 2000 (unreported), § 1(5) and (6); and *G.J. v. Luxembourg*, *supra* note 32, § 24 with regard to the “mere vehicle” approach as well as the “impossibility” approach.

<sup>46</sup> Tom Zwart, *The Admissibility of Human Rights Petitions. The Case Law of the European Commission of Human Rights and the Human Rights Committee*, Dordrecht 1994, 48.

<sup>47</sup> *Agrotexim v. Greece*, *supra* note 15, § 70(1).

<sup>48</sup> *Agrotexim v. Greece*, *supra* note 15, § 70(2).

<sup>49</sup> Application No 14807/89, *Agrotexim Hellas SA and Others v. Greece*, admissibility decision 12 February 1992, (1992) 72 DR 148, 156.

<sup>50</sup> Application No 15777/89, *Matos e Silva Lda and Others v. Portugal*, admissibility decision 20 November 1999 (not discussed by the Court). Strasbourg case law has only discussed shareholding influence in terms of percentage of share ownership. It is not unthinkable that the Court would conduct a broader inquiry which includes other means of influence such as voting rights and procedures, etc., similar to the “control test” increasingly favoured in international law, see, e.g., Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge 2001, 285 and 322; and Charles N Bower/Jason D Brueschke, *The Iran-United States Claims Tribunal*, The Hague 1998, 55-56.

to consider various stakes held by the shareholder besides those flowing from the possession of shares, such as management positions,<sup>51</sup> and status as joint debtor for company loans.<sup>52</sup>

Other kinds of personal involvement may also suggest identification. In *G.J. v. Luxembourg*, the applicant shareholder's son died during the period in which the process of liquidating the company was delayed, and that the applicant, because of his son's death to no avail had asked for a swift settling of the proceedings.<sup>53</sup> The Court and Commission found that his direct personal interests were involved by the complaint, and linked their view to his controlling shareholding.<sup>54</sup> Yet, it is possible that all factors available in the case helped the Court on its way to the conclusion of admissibility: the "activities of the liquidators" were also taken into account.<sup>55</sup>

The amount of prejudice sustained by the corporate entity (and indirectly, the shareholder applicant) is also relevant. Diminutive financial or other prejudice inflicted on the company is presumably also less pressing for the shareholder, which consequently suggests that identification is not genuinely needed.<sup>56</sup> The degree and kind of state involvement in the alleged violation might also influence the view on admissibility. The more directly involved an organ of the state has been in the alleged contravention, the more likely is it that the shareholder may be identified with the company. If, on the other hand, the state has played more of a facilitative part in the alleged violation, such as the handling an inter-private dispute in domestic courts, there is perhaps less reason to "pierce the veil".<sup>57</sup> Shareholder intervention on the company's behalf is, furthermore, besides less deserving of Strasbourg attention when the company joins the application.<sup>58</sup> Presumably, the Strasbourg authorities will here regard the admittance of the company's claim as a sufficient (albeit indirect) mode of redress for the applicant shareholder.

As is explained further below, the local remedies criterion in Article 35 is rarely discussed in the context of shareholders' identification claims. Strasbourg authorities nonetheless occasionally consider, when interpreting Article 34, whether the

<sup>51</sup> *Kaplan v. United Kingdom*, *supra* note 18, 23, § 130; and Application No 12547/86, *M.B. v. France*, admissibility decision 6 July 1990, § 2(19).

<sup>52</sup> *M.B. v. France*, *supra* note 51, § 2(20); and Application No 10259/83, *Spri ANCA and Others v. Belgium*, admissibility decision 10 December 1984, (1984) 40 DR 170, 177.

<sup>53</sup> *G.J. v. Luxembourg*, *supra* note 32, §§ 14-15.

<sup>54</sup> *G.J. v. Luxembourg*, *supra* note 32, § 24.

<sup>55</sup> *G.J. v. Luxembourg*, *supra* note 32, § 24 first sentence; see also Application No 11834/85, *Euro-Art Centre BV and Others v. Netherlands*, admissibility decision 5 October 1987.

<sup>56</sup> *Kustannus v. Finland*, *supra* note 30; and *J.W. v. Poland*, *supra* note 31.

<sup>57</sup> *Agrotexim v. Greece*, *supra* note 15, §§ 63(3) and 68; and *G.J. v. Luxembourg*, *supra* note 32, § 24 first sentence imply as much.

<sup>58</sup> Application No 18737/91, *Dias da Fonesca, da Costa and Dias e Costa Lda v. Portugal*, admissibility decision 31 August 1994. See also *SGI and Others v. France*, *supra* note 28; and *Credit and Industrial Bank and Moravec v. Czech Republic*, *supra* note 44. But see, conversely, *Matos e Silva Lda and Others v. Portugal*, judgment 16 September 1996, Reports 1996-IV.

applicant shareholder was part of the proceedings of the underlying dispute. The partaking in domestic court proceedings is highly significant when the complaint in question precisely concerns these proceedings. In *Neves e Silva v. Portugal*, the Court emphasised that the applicant shareholder was entitled as a “victim” to lodge a complaint over the manner in which the domestic court proceedings had been conducted because he himself had been a party to those proceedings. Because of this participation, the shareholder’s mere 30% ownership was not a decisive factor.<sup>59</sup>

The flexibility in finding possible exceptions to the principle of non-identification is well-documented in the Court’s most recent consideration of the corporate veil. In *Credit and Industrial Bank and Moravec v. the Czech Republic*<sup>60</sup>, the Court was faced with an application from the majority shareholder of the applicant bank, in which the shareholder complained of the nature of the process of placing the applicant bank in compulsory administrator in the course of liquidation, allegedly in contravention with Article 6(1). The Court, reiterating the *Agrotexim* principle of non-identification and the possibility of lifting the corporate veil in “exceptional circumstances”, observed that

... in contrast to the situation in [*Agrotexim*], the complaint ... in the present case relates not to an alleged interference with the property rights of the bank which the compulsory administrator had been appointed to protect and manage and in respect of which the administrator could apply on the bank’s behalf to the Convention institutions. On the contrary, the complaint made relates to the very fact that a compulsory administrator was appointed ... without a proper opportunity being granted to the bank which was the subject of the administration order to oppose it. Where ... the essence of the complaint is the denial of effective access to court to oppose or appeal against the appointment of a compulsory administrator, to hold that the administrator alone was authorised to represent the bank in lodging an application with the [Court] would be to render the right of individual petition conferred by Article 34 theoretical and illusory. ... The Court accordingly finds that, having regard to the particular nature of the complaints made, there were exceptional circumstances which entitled Mr Moravec ... to lodge a valid application on the bank’s behalf ...<sup>61</sup>

#### 4. Explaining the Strasbourg Approach

It has now been shown how the Court today responds to shareholder claims for identification. The Court, it is true, approaches this body of litigation in a manner which enables effective Convention protection when deemed appropriate all facts of the case considered. The principle of non-identification nonetheless prevails as a starting point and general rule; exceptions are not easily accepted. The Court’s preference for a municipal legal maxim may therefore appear at odds with ECHR

<sup>59</sup> *Neves e Silva v. Portugal*, *supra* note 30, § 39; and *J.W. v. Poland*, *supra* note 31. See, conversely, *Matos e Silva Lda and Others v. Portugal*, *supra* note 58, §§ 14-45.

<sup>60</sup> *Credit and Industrial Bank and Moravec v. the Czech Republic*, *supra* note 32.

<sup>61</sup> *Credit and Industrial Bank and Moravec v. the Czech Republic*, *supra* note 32, §§ 51-52.

law's predominant disposition for effective human rights protection because a more accommodating approach would have acknowledged individual shareholders' perhaps justifiable request for protection of their financial interests

An appreciation of this apparent anomaly is closely related to the Court's motivation for adhering to the principle of non-identification. The purpose of the present Part is to examine the Court's rationale for upholding the corporate veil on the level of international law.<sup>62</sup> First, in (a), the two main arguments for non-identification as offered by the Court are introduced. It will be submitted that they cannot fully explain the Court's corporate veil doctrine, at least if they are taken at face value. A set of structurally inspired explanations is proposed in (b) as an appendage to the Court's given rationale. In (c), a brief introduction to the justifications for identification is offered.

### (a) The Court's Rationale on Its Face

The Court in *Agrotexim* offered two main arguments in support of a doctrine of non-identification. They are considered separately.

#### (i) Justification 1: Concern for Disintegration of the Right of Application

The *Agrotexim* Court justified non-identification first of all in the following statement:

It is a perfectly normal occurrence in the life of a limited liability company for there to be differences of opinion among its shareholders or between its shareholders and its board of directors as to the reality of an infringement of the right to the peaceful enjoyment of the company's possessions or concerning the most appropriate way of reacting to such an infringement. Such differences of opinion may, however, be more serious where the company is in the process of liquidation because the realisation of its assets and the discharging of its liabilities are intended primarily to meet the claims of the creditors of the company whose survival is rendered impossible by its financial situation, and only a secondary aim to satisfy the claims of the shareholders, among whom any remaining assets are divided up.

To adopt the Commission's position would be to run the risk of creating – in view of these competing interests – difficulties in determining who is entitled to apply to the Strasbourg institutions.<sup>63</sup>

This argument may be understood as an ostensibly procedural argument for non-identification. To allow shareholders to apply on a company's behalf would, according to the Court, entail an unwanted disintegration of the right of applica-

<sup>62</sup> In a comment on *Agrotexim* the anonymous commentator appears to have found the adoption of non-identification unconvincing without, however, specifying why this was the case, see Company Law: Victim – Shareholders in Company – Lifting the Corporate Veil, (1996) EHRLR 191, 193, (1996). The rationale of the Court remains unexplored in ECHR literature.

<sup>63</sup> *Agrotexim v. Greece*, *supra* note 15, § 65(1) and (2).

tion in corporate matters. It would lead to “difficulties in determining who is entitled to apply” to the Court. The concern is apparently accentuated when different company constituents potentially represent “competing interests”, such as when two groups of shareholders disagree on matters of corporate policy. The problem is even greater when the company is in financial ruin and the interests of shareholders and creditors are fundamentally different as well as imperative for the actors involved.

This rationale presupposes that the law of the Convention clearly designates the person among corporate constituents who is uniquely entrusted with the right to apply to Strasbourg on the corporate body’s behalf. This makes some sense. The right to apply to Strasbourg for a company, as a “non-governmental organisation”, cannot practically be exercised by all and sundry with stakes in the company’s activities. A specific representative must be appointed to act for the whole of the company. The Rules of Court allocate the capacity to submit claims on the company’s behalf by pointing, it must be conjectured, to the ordinary arrangement for representation in municipal law.<sup>64</sup> This power normally belongs to the company’s management and/or the Board of Directors.

It would effectively undercut a practical line of clarity if shareholders were additionally allowed to submit complaints for matters involving the company. The clarity is instrumental for facilitating a workable climate for business, a sector of society in which foreseeability is often held to be of paramount importance. It is likely that the fear of breakdown of a united corporate front was part of the “difficulty” to which the Court referred.

The Court’s justification does not, however, sound wholly convincing. The “victim” requirement denotes an autonomous concept. “Victimhood” implies direct affectedness for the contested measure, the assessment of which is in principle undertaken independently of domestic legal arrangements, such as separate corporate personhood and designation of legitimate company representatives. The “victim” requirement does not prevent all affected persons from applying to the Court if they have in fact been affected by the same contested measure.

The given rationale also fails to take into account the fact that the Court, without apparently provoking any particular concern within a united corporate front, does admit applications on the company’s behalf submitted by other persons than the ordinarily entrusted representative. These claims may come from shareholders,<sup>65</sup> but the Court has even accepted that employees may have standing in cases that formally have impinged on the company person only.<sup>66</sup> The Commission seems to have accepted on a more general basis a breakdown of the normal system

<sup>64</sup> Rule 45 (Signatures) of the Rules of Court states in (1) that any private application “shall be signed by the applicant or the applicant’s representative” and in (2) that, in the case of applications submitted by non-governmental organizations, “it shall be signed by those persons competent to represent that organization ... The Chamber or Committee [of the Court] shall determine any question as to whether the persons who have signed an application are competent to do so”.

<sup>65</sup> *Matos e Silva Lda and Others v. Portugal*, *supra* note 58, is one example.

<sup>66</sup> *Gropper Radio AG and Others v. Switzerland*, judgment 28 March 1990, Series A 73, § 49.

for corporate representation.<sup>67</sup> International legal development after *Barcelona Traction* has similarly opened for the submission of competing claims to a certain extent.<sup>68</sup> While this is not a decisive argument in any direction, the Court's rationale is at least not necessarily in tune with international law trends at this point.

### (ii) Justification 2: Unreasonable Application of Local Remedies Rule

The *Agrotexim* Court offered a second argument for non-identification, which likewise appears to signal consideration for technical-legal matters. The Court supported a non-identification principle because a different solution

... would also engender considerable problems concerning the requirement of exhaustion of remedies. It may be assumed that in the majority of national legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or an omission that is prejudicial to "their" company. It would accordingly be unreasonable to require them to do so before complaining of such an act or omission before the Convention institutions. Nor could, conversely, a company be required to exhaust domestic institutions itself, because the shareholders are of course not empowered to take such proceedings on behalf of "their" company.<sup>69</sup>

A full comprehension of the statement requires familiarity with another admissibility requirement from that of concern in *Agrotexim*, notably the requirement that the applicant has exhausted all domestic remedies.

### (iii) The Local Remedies Requirement

The local remedies rule, provided for in Article 35(1) (formerly Article 26), states that: "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rule of international law". The condition allows the respondent state first to have an opportunity to redress the alleged wrong;<sup>70</sup> this, and the protection of the rights of the individual person, is the essential purpose of the local remedies rule in an international human rights context.<sup>71</sup> Only the absence of an opportunity for domestic redress entitles the applicant to initiate proceedings on the supranational level.

A shareholder complaint brought before the Court whereby identification is sought relates to a dispute over the appropriateness of a measure (or lack thereof)

<sup>67</sup> Application No 9905/82, *A. Association and H. v. Austria*, admissibility decision 15 March 1984, DR 36, 187, 192-193 makes this very clear in the context of Article 11 (freedom of assembly; parallel claims from association and its president were seen as unproblematic from the viewpoint of ECHR law).

<sup>68</sup> Francisco Orrego Vicuña, *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement*, 15 ICSID Review 340, 355-358, (2001).

<sup>69</sup> *Agrotexim v. Greece*, *supra* note 15, § 65(3), reiterated in *Olczak v. Poland*, *supra* note 9, § 57 and *J.W. v. Poland*, *supra* note 31.

<sup>70</sup> See, e.g., *Van Oosterwijck v. Belgium*, judgment 6 November 1980 (Plenary Court), Series A 40, § 34; and *Zwart*, *supra* note 46, 187.

which national authorities have undertaken against the applicant's company. Evidently, the majority of domestic legal systems themselves adhere to a principle of non-identification in such instances. Shareholders would not, therefore, be able to litigate on the company's behalf before national dispute-settling organs. This form of litigious action is for the company to initiate. Recognition of veil piercing under the "victim" requirement in Article 34 would therefore assume that either the shareholders or the company has unsuccessfully made use of all national legal remedies to no avail, although the fact of things suggests that the presence of the corporate veil in municipal law would effectively bar a shareholder applicant from satisfying the local remedies rule. The shareholder is generally barred from taking legal action for such disputes in national courts. To allow identification on the level of ECHR law would therefore, in the Court's opinion, be futile, and it would consequently be "unreasonable" on the part of the shareholders to require the satisfaction of the local remedies requirement.

The Court also says that it would be anomalous if the company itself should seek local redress for the essence of a claim subsequently advanced by the shareholder. A shareholder would seek identification in Strasbourg because of the company's unwillingness or inability to initiate proceedings on its own behalf. Identification under Article 34 would endorse an arrangement that would effectively empower shareholders to demand their companies to take domestic procedural steps in the interests of the shareholders. Such an arrangement runs counter to the very essence of corporate decision making processes.

For these reasons, said the Court in *Agrotexim*, non-identification must be the general rule and starting point in the interpretation of Article 34.

#### (iv) An Unsatisfactory Interpretation

The second portion of the *Agrotexim* rationale does not, it is submitted here, provide a satisfactory justification for non-identification. It represents an interpretation of the domestic remedies rule which only insufficiently corresponds with its general interpretation in ECHR law.<sup>72</sup>

It is, arguably, partly a matter of guesswork how the local remedies requirement in Article 35(1) is or should be understood in the context under consideration here. Strasbourg case law provides no unequivocal solution since shareholders' identification claims are for all practical purposes dismissed (or exceptionally admitted) by virtue of the "victim" requirement, and not (also) the exhaustion of local remedies condition. The Article 35 requirement has plainly not been subject to substantial

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<sup>71</sup> Antônio A Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law. Its Rationale in the International Protection of Human Rights*, Cambridge 1983, 14-18 and 46-56.

<sup>72</sup> Aron M Aronovitz, *Notes on the Current Status of the Rule of Exhaustion of Local Remedies in the European Convention on Human Rights*, 25 *Israel Yearbook on Human Rights* 73, (1995), is a comprehensive introduction to the local remedies rule.

interpretation as far as corporate veil issues are concerned. Yet, it is still possible to infer from the case law how Article 35(1) may be understood in the present context.

For instance, the Court's interpretation of the requirement in the "indirect victimhood" doctrine adheres not to the assumption conceivably held in *Agrotexim* that an applicant shareholder needs satisfy the exhaustion of local remedies condition for his claim to be admitted. Naturally, the applicant shareholder is the person normally called to exhaust all national legal means. In "indirect victim" instances, however, this normality is modified by the nature of "indirect victimhood" claims. If the direct victim has indeed exhausted all local remedies, the indirect victim's status is identified with that of the direct victim in the sense that the indirect victim, the applicant, is not required to have exhausted the remedies also. Only if the direct victim has failed to exhaust domestic remedies is the indirect victim required to exhaust remedies personally.<sup>73</sup>

Similarly, shareholders, it may be conjectured, have satisfied the local remedies requirement if the shareholder or his company has indeed made use of all adequate and effective legal remedies in the national legal system. There is, in that case, no necessity under Article 35(1) that a shareholder exhausts all domestic remedies, and the "unreasonableness" mentioned in *Agrotexim* needs not materialise. The rationale offered by the Court is apposite only in instances in which the company has not taken legal action against the contested measure in domestic tribunals.

Furthermore, as the local remedies requirement emphasises national authorities' entitlement to correct human rights disputes on a local level, the rule's essential justification suggests that it is less important who exactly to no avail has sought legal redress for the contested measure in the national legal system. The centre of attention is the extent to which the essence of the matter at hand, objectively speaking, has been sufficiently examined by domestic authorities.<sup>74</sup> Besides, as is the case with the "victim" requirement, the local remedies rule is applied with "some degree of flexibility and without excessive formalism".<sup>75</sup> In reviewing whether the rule has been observed it is essential, says the Court, to have regard to the particular circumstances of each individual case.<sup>76</sup> The local remedies rule merely requires that the victim utilise domestic remedies which are likely to be adequate and effective.<sup>77</sup> Any applicant is therefore dispensed from the obligation to have utilised na-

<sup>73</sup> Application No 4185/69, *X. v. Germany*, admissibility decision 13 July 1970, CD 35, 40 (identification between husband and wife). See also Laurids Mikaelson, European Protection of Human Rights: the Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States, Alphen aan den Rijn 1980, 134.

<sup>74</sup> This aspect can only be inferred from the case law, see, e.g., *Airey v. Ireland*, *supra* note 12, § 19(b) (2).

<sup>75</sup> *Cardot v. France*, judgment 19 March 1991, Series A 200, § 34.

<sup>76</sup> *Van Oosterwijck v. Belgium*, *supra* note 70, § 35.

<sup>77</sup> The exact terms are rarely applied explicitly by the Court and the Commission. In the words of the Commission in one of its first encounters with the condition: "... the rules governing the exhaustion of the local remedies, as they are generally recognized today, in principle require that recourse should be had to all legal remedies available under the local law which are in principle capable of

tional means of redress if in the circumstances of the case they are ineffective or inadequate.<sup>78</sup> Shareholder claims for identification with a company often arise from disputes in which no adequate or effective remedy would exist. In this respect, the local remedies requirement may be exempted from application as far as shareholders' identification claims are concerned.<sup>79</sup> It has been suggested that a similar solution is applied in international law more generally.<sup>80</sup> Perhaps ominous for the authority of the Court's second rationale in *Agrotexim*, this understanding of the local remedies rule has also been advanced in Commission decisions concerning shareholders' identification claims.<sup>81</sup>

### (b) The Structural Rationale: Concern for Private Enterprise and Sovereign Legislative Authority

The critique of *Agrotexim*'s rationale as understood *prima facie* does not lead to the conclusion that the principle of non-identification rests on a flawed premise. Rather, it is to be assumed that the explanations given by the Court must be read in a structural context. Two structural factors are particularly useful means for understanding the legitimacy of the Court's adoption of *Barcelona Traction's* non-identification doctrine. They are introduced in turn.

#### (i) Concern for the Attractiveness of the Company Form

The corporate veil is generally explained by a variety of reasons in municipal law. One recurrent justification for refusing identification is the need to pay due regard to the internal decision making process of the corporate entity. An inherent quality of the company is its distinct procedural apparatus for intra-corporate decision-making and dispute settlement processes. Rather than exposing one particular domestic system's rationale here, it suffices to reiterate the ICJ's mentioning of it in

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providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the Respondent State is alleged to be responsible" see Application No 343/57, *Schoww Nielsen v. Denmark*, admissibility decision 2 September 1959, (1958-59) 2 YB 412, 440. In *Deweer v. Belgium*, judgment 27 February 1980, Series A 35, § 29 the Court spoke of "available and effective" remedies. But it is undoubtedly the essence of the rule in Article 35(1), see, e.g., van Dijk/van Hoof, *supra* note 12, 136. On adequacy and effectiveness, see in particular Cançado Trindade, *supra* note 71, 69-80.

<sup>78</sup> van Dijk/van Hoof, *supra* note 12, 136.

<sup>79</sup> Henry G Schermers, Exhaustion of Domestic Remedies, in: Nisuke Ado, Edward McWhinney and Rüdiger Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda*, vol. 2, The Hague 2002, 947, 955 merely points at the "unfairness" of an opposite solution; he appears to believe that it does not run counter to present interpretative practice.

<sup>80</sup> C F Amerasinghe, *Local Remedies in International Law*, Cambridge 1990, 179-181 with further references.

<sup>81</sup> *Agrotexim Hellas SA and Others v. Greece*, admissibility decision, *supra* note 103, 158; Application No 21156/93; *G.J. v. Luxembourg*, admissibility decision 22 October 1996; *Matos e Silva, Lda and Others v. Portugal*, *supra* note 50; and *Pine Valley Developments Ltd and Others v. Ireland*, *supra* note 41.

*Barcelona Traction*. The universal prevalence of the justification was an instrumental factor for the transposition of the corporate veil in international law:

It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve the shareholders, too. Ordinarily, no individual shareholder can take legal steps, either in the name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of law, change them or replace its officers, or take such actions as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.<sup>82</sup>

The Strasbourg Court has not expressed itself in a similarly direct manner. But the Court's concern for disintegration of the right to application should be read in light of its immediately preceding observance of the "perfectly normal occurrence" of disagreement between corporate owners or between shareholders and management as to the lawfulness of measures affecting the company.<sup>83</sup>

The conjecture that the Court, too, sees the need to preserve the internal corporate decision making structure is evident in *Olczak v. Poland*, where the Court stated that

... it should be recalled that the concept of the public company is founded upon a firm distinction between the rights of the company and those of its shareholders. Only the company, endowed with legal personality, can take action in respect of corporate matters. A wrong done to the company can indirectly cause prejudice to its shareholders, but this does not imply that both are entitled to claim compensation. Whenever a shareholder's interests are harmed by a measure directed at the company, it is up to the latter to take appropriate action.<sup>84</sup>

A related recurrent argument for non-identification, on symmetry, brings us closer to the essence of the need to uphold internal corporate processes on the level of ECHR law. A shareholder runs no risk of being held fully responsible for the company's debts and obligations. Limited responsibility needs to correspond with limited influence in the corporate entity; it is an inevitable risk of this form of investment.<sup>85</sup> As observed in *Barcelona Traction*:

... in forming a company, its promoters are guided by all various factors involved, the advantages and disadvantages of which they take into account. So equally does a share-

<sup>82</sup> *Barcelona Traction*, *supra* note 2, 35 (§ 42).

<sup>83</sup> *Agrotexim v. Greece*, *supra* note 15, § 65(1).

<sup>84</sup> *Olczak v. Poland*, *supra* note 9, § 59. See also *Ankarcrona v. Sweden*, *supra* note 45, § 1(5).

<sup>85</sup> *Barcelona Traction*, *supra* note 2, 50 (§ 99).

holder, whether he is an original subscriber to the capital or a subsequent purchaser of the company's shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation – or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event, he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazard or from prejudice caused to the company by illegal treatment of some kind.<sup>86</sup>

The company's essential appeal as means for business investment lies in its fluctuating membership and autonomy vis-à-vis its individual owners. Failing such qualities, the company form would lose its attractiveness as a vehicle for economic enterprise. A fundamental requirement for sustaining these qualities is the possibility of internal disagreement being solved in a specially designed way within the corporate entity. It was eloquently phrased in *Barcelona Traction* by Sir Gerald Fitzmaurice in his separate opinion:

The true rationale ... of denying to the shareholder the possibility of action in respect of infringements of company rights is that, normally, he does not need this. The company will act and, by so doing, will automatically protect not only its own interests but those of the shareholders also. That is the assumption – namely that the company is both capable of acting and will do so unless there are cogent reasons why, in the interest of the company, and, hence, indirectly the shareholders, it should refrain, – the decision involved being one of policy, *prima facie* for the determination for the management. ...

The assumption that the company will act, or will have good reasons for not doing so – (reasons which will be in the eventual interests of the shareholders also) – underlies equally the variously expressed axiom, on the presumed truth of which so much of the applicable law is based – namely that the fate of the shareholder is bound up with that of the company; that his fortunes follow the latter's; that having elected to throw in his lot with the company, he must abide by the consequences, be they good or bad, so long as he maintains his connection with it ...<sup>87</sup>

Transported to the ECHR context, these views inform us that a disregard for corporate personality, as sought in *Agrotexim*, would undermine the company's internal constitutional process, and make the company form less appealing for investors. It is reasonable to assume that the Court accepts no generous identification doctrine because it would undermine the subsistence of an important instrument for economic activity. The first rationale in favour of the corporate veil doctrine in Article 34 is therefore appropriately explained as a justification in which the Court shows legitimate concern for socio-economic realities. It seeks to safeguard and facilitate structural support for a significant vehicle for economic prosperity in the ECHR member states and for an activity which the Court arguably is set up to protect. The corporate entity is a "powerful factor in the economic life of nations";<sup>88</sup> a disregard for this reality does not seem particularly advisable.<sup>89</sup>

<sup>86</sup> *Barcelona Traction*, *supra* note 2, 35 (§ 43).

<sup>87</sup> *Barcelona Traction*, *supra* note 2, Separate Opinion of Judge Fitzmaurice, 60 (§§ 10-11).

<sup>88</sup> *Barcelona Traction*, *supra* note 2, 34 (§ 39).

## (ii) Respect for Sovereign Legislative Authority

The second part of the given justification, the reference to the local remedies rule, can also be understood in a broader context, which makes the Court's reliance on it more plausible as an argument in favour of non-identification.

The Court was concerned with the application of the local remedies requirement because it "assumed that in the majority of national legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or omission that is prejudicial to 'their' company". It also emphasised that "shareholders are of course not empowered to take such proceedings on behalf of 'their' company".<sup>90</sup> The "assumptions" to which the Court referred concern hard realities involving highly significant matters.

It should be born in mind that the Court, by upholding the corporate veil, effectively transported the construct of corporate personhood to the level of ECHR law, although it was not necessarily bound to do so when interpreting Article 34. It also referred to *Barcelona Traction* to justify its approach; a central aspect of that judgment was the need for international law to reflect the municipal legal creation of corporate personality as a matter of legal reality. The ICJ had stated that it "has ... not only to take cognizance of municipal law but also to refer to it. ... In referring to such rules, the Court cannot modify, still less deform them".<sup>91</sup> Why is it important for international courts to refer domestic law as far as corporate personality is concerned?

The ECHR is a Convention whose purpose is domestic implementation primarily and international scrutiny secondarily.<sup>92</sup> Implicitly, therefore, identification in Strasbourg would entail the proposition that in municipal law, too, identification should be more generously applied. The adoption of a rule of identification would in particular impinge on procedural legal arrangements in the Convention's member states, including those which concern corporate standing before national courts. "Veil piercing" internationally imposed would ultimately interfere with how "the majority of legal systems" in ECHR member states have set up their company and other laws. It would interfere with national legislative power.

The Court did not directly apply this line of argument. But there is good reason to suppose that it must have been on the Court's mind as an unavoidable factor to be taken into account.

<sup>89</sup> Dignam/Allen, *supra* note 29, 217 makes a similar argument for explaining *Agrotexim* when they refer to the need for "stability" in economic life.

<sup>90</sup> *Agrotexim v. Greece*, *supra* note 15, § 65(3).

<sup>91</sup> *Barcelona Traction*, *supra* note 2, 37 (§ 50). This direct transport of municipal law to the level of international law was heavily criticised by the ICJ dissenters, see, e.g., Separate Opinion of Judge Riphagen, 338 (§§ 6-7), and Separate Opinion of Judge Tanaka, 82-84. It has also been criticised by theorists, see, e.g., Díez de Velasco, *supra* note 10, 155-157.

<sup>92</sup> This is the essence of the principle of subsidiarity, to which the Court subscribes, see generally, e.g., Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in: Ronald St John Macdonald/Franz Matscher/Herbert Petzold (eds.), *The European System for the Protection of Human Rights*, Dordrecht 1993, 41.

In its examination of the complaints of violations of Articles 6 and 13, the *Agrotexim* Court, for instance, stated that neither provision could “imply that under the national law of the Contracting States shareholders in a limited company should have the right to bring an action seeking an injunction or damages in respect of an act or omission that is prejudicial to ‘their’ company”.<sup>93</sup> It thereby accepted that fundamental procedural rights of the Convention could not be interpreted in a manner which would enable shareholders to ignore the municipal legal arrangement of internal corporate decision making processes. Concern for national legislative sovereignty was in other words not a stranger to the Court. It also remarked in support of non-identification that “the Supreme Courts of certain member States of the Council of Europe have taken the same line [of non-identification]”, thus apparently making a “common European standard” argument for non-identification, which is closely linked with sovereignty concerns.<sup>94</sup>

More generally, the Convention builds on a supranational premise and reflects intra-European commonalities. This structural feature of the ECHR clearly suggests that the Court considers sovereignty interests. The interests of the nation-state and national authority permeate the ECHR structure, such as in the rights-provisions’ granting of considerable public interference with private rights. The Court generally applies means for interpretation which are favourable to the respondent states: the margin of appreciation doctrine epitomises the ECHR law’s deference to sovereign authority in this respect.<sup>95</sup> It would be contrary to the Court’s general mode of reasoning had not the Court, when interpreting the “victim” requirement, considered the impact its conclusion would have on sovereign legislative authority.

### (c) Arguments in Favour of Identification

The reasons given above in support of respect for the corporate veil explain, inversely, why identification may occur when these reasons are not present. Thus, when the company is no longer extant or capable of promoting its own interests, there is little reason to fear a complaint submitted by a shareholder who represents it. The ordinary corporate decision making process, which in other instances ought to be respected, no longer functions properly. Also, when the company’s decision making process does not work as conceived, typically in matters in which the rights of minority shareholders are sidelined by an authoritarian management, some of the reasons for paying respect to corporate decision making processes has been eroded. In such instances, the shareholder cannot seek recourse within the corpo-

<sup>93</sup> *Agrotexim v. Greece*, *supra* note 15, § 73(2); the reference here to § 66 strengthens this view.

<sup>94</sup> *Agrotexim v. Greece*, *supra* note 15, § 66 second sentence. On European consensus as means of ECHR interpretation, see, e.g., John G Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester 1993, 78-81.

<sup>95</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp 2002, is a recent examination of the doctrine.

rate structure as intended.<sup>96</sup> There are traces of this argumentation in *G.J. v. Luxembourg*, where the Court accented the behaviour of the liquidators, thus implying that the shareholder was justified to contest their performance and therefore entitled to submit a Strasbourg complaint.<sup>97</sup>

Similarly, when the shareholder due to his dominant ownership in the company is but formally representing the same legal sphere as his company, identification may safely be undertaken on the level of international law. Similar forms of identification are, after all, also known to most domestic legal systems: identification would not impinge on sovereign legislative power in the same way as it would when Strasbourg exceptions are not corresponding with domestic legal arrangements. Likewise, the argument suggesting due consideration of corporate process lacks impetus when the corporate management and organs for all practical purposes are identical with the applicant shareholder.<sup>98</sup>

Judge Walsh, the sole dissenter in *Agrotexim*, objected to the adoption of a principle of non-identification because he thought it “anomalous that the defence of human rights in the field of property, or otherwise, should yield to the commercially sacred impenetrability of the ‘corporate veil’”.<sup>99</sup> He was apparently not convinced that a municipal legal construct such as separate legal personality for companies should be transported to the level of ECHR law, especially when it entails an impairment of human rights protection in individual cases. This is a valid viewpoint, and one with a long history in international law at that. It was, for instance, at the heart of the dispute in *Barcelona Traction* between the majority Court and the dissenting judges.<sup>100</sup> The character of the “victim” requirement in Article 34 as an autonomous concept signals that the allocation of the legal spheres of companies and their constituents as laid down in domestic laws does not formally bind the Court.

Yet at the same time, it must be born in mind that the notion of separate corporate personhood enjoys Convention recognition.<sup>101</sup> In particular, P1 Article 1(1) refers to “legal persons” among those entitled to seek protection under that provision, which implies that juristic personhood for corporate entities is a judicial artefact deserving, at least, property rights protection. More generally, the Court ac-

<sup>96</sup> This argument is found in municipal law, as suggested by Dignam/Allen, *supra* note 29, 177. It was relied on by for international law purposes in *Barcelona Traction*, *supra* note 2, Separate Opinion of Judge Fitzmaurice, 70 (§ 11(4)).

<sup>97</sup> *G.J. v. Luxembourg*, *supra* note 32, § 24 first sentence.

<sup>98</sup> *Ankarcrona v. Sweden*, *supra* note 45, § 1(5).

<sup>99</sup> *Agrotexim v. Greece*, *supra* note 15, Dissenting Opinion of Judge Walsh, § 3.1.

<sup>100</sup> The view was well argued, for instance, by Judges Riphagen and Tanaka. See further Lucius C Cafilisch, *The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case*, 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 162, 171-172 and 183, (1971).

<sup>101</sup> Arguably, P1 Article 1 refers to the “legal person”, thus implicitly suggesting that juristic personality under municipal law is a relevant factor when interpreting the Convention’s property clause. The “victim” requirement makes no similar direct expression, and Article 34 speaks of “non-governmental organisations” generally, thus also including organisations without separate legal personality.

cepts the protection of legal persons in a great number of ECHR provisions. It would perhaps not rhyme well with the internal symmetry of the Convention if juristic persons were offered protection by virtue of substantive provisions, yet juristic personhood enjoyed no explicit acknowledgement as far as the “victim” requirement was concerned.<sup>102</sup>

Effective human rights protection in individual cases brought before the Court regardless of the formality of the corporate veil was obviously of concern for Judge Walsh more than macro-economic considerations and respect for national sovereignty. More generally, equity considerations and pragmatism are strong arguments for identification. The introduction of pragmatism in international corporate veil discourse, suggested by the *Barcelona Traction* dissenters and critics,<sup>103</sup> has, importantly, gained terrain in international legal development.<sup>104</sup>

## 5. Summary Observations

The present article has analysed the construction of the corporate veil in the case law of the European Court of Human Rights. The Court as a starting point and general rule adheres to a principle of non-identification when shareholders submit applications in which they seek ECHR protection for measures formally concerning the company in which they own shares. *Agrotexim* apparently invoked the formalism of *Barcelona Traction*, even when subsequent practice from the ICJ registers an implicit rejection of its 1970 holding.<sup>105</sup>

It is, however, not correct to see the Strasbourg Court as an indiscriminate adherent of *Barcelona Traction's* “rigidity”. The *Agrotexim* Court did not reiterate *Barcelona Traction's* clearest formalist passages.<sup>106</sup> A lifting of the corporate veil is permissible in exceptional circumstances. Nor does the Court apply the *Agrotexim*

<sup>102</sup> The term “non-governmental organisation” in Article 34 does not, incidentally, correspond with entities with juristic personhood; the term encompasses in principle entities regardless of legal personality under municipal law.

<sup>103</sup> All *Barcelona Traction* dissenters essentially advocated pragmatism over formalism, but they framed their views somewhat differently. See, e.g., *Barcelona Traction*, *supra* note 2, Separate Opinion of Judge Tanaka, 114.

<sup>104</sup> The relevant development cannot be restated in full here. There is an increasing tendency to accept identification beyond the two exceptions acknowledged by the *Barcelona Traction* majority and to apply a “control” test for identification, according to which the extent to which the shareholder controls the company plays a central role. See, for instance the summary in Yoram Dinstein, *Diplomatic Protection of Companies under International Law*, in: Karel Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague 1998, 505.

<sup>105</sup> See Case concerning *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ Reports 1989, 15. For a recent comment on the difference between the *ELSI* case and *Barcelona Traction* see Vaughan Lowe, “Shareholders’ Rights to Control and Manage: From *Barcelona* to *ELSI*”, in: Nisuke Ando/Edward McWhinney/Rüdiger Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda*, vol. 1, The Hague 2002, 269.

<sup>106</sup> The rejection of pragmatism was particularly evident in *Barcelona Traction*, *supra* note 2, 48 (§§ 92-93).

principle, or its two exceptions, mechanically. It concedes that a certain amount of flexibility is desirable from the viewpoint of the applicants in question, in particular when international scrutiny is required. It would not fit with the Court's nature to adhere to a legal concept if it leads to "paradox, anomaly and injustice".<sup>107</sup> A practice, in which the corporate veil was to be sustained unreservedly, would plainly not correspond with the Court's universal adoption of the principle of effectiveness.

The present article has submitted that the non-identification doctrine comprises two justifications in addition to the technical-legal arguments directly mentioned by the Court. The corporate veil is indispensable for the corporate entity's attraction as an economic vehicle; the Court's approach can therefore be seen as an expression of concern for the interests of private enterprise, which again has consequences for the national economy. Second, had not the Court upheld the corporate veil, the nature of ECHR implementation suggests that the signatory states similarly may have needed to amend their domestic legal approach to separate corporate personhood. Identification would therefore amount to unwanted international interference with sovereign legislative power.

The most important conclusion to be drawn from the structural rationale is not that it must have influenced the Court's approach. Rather, it informs us that the Court rests its interpretation on considerations that are extraneous to the actual dispute. The Court adjudicates in individual disputes and does extensively include in its jurisprudence the individual needs of the involved parties. But the Court cannot be oblivious to the general impact of its pronouncement of ECHR law. The Convention has the capacity to affect European society; this the Court clearly admits. Perhaps as significantly, the *Agrotexim* principle demonstrates that the Court develops law that influences private and public spheres alike. This insight may not be particularly radical. Presumably, it is a form of instrumentality which permeates all ECHR law. It is nonetheless underappreciated in ECHR discourse.

A juxtaposition of the Strasbourg approach and current international law and practice, which increasingly favours a holistic view on the protection of shareholders' foreign investments, involves therefore no display of drama. The ostensible paradox that the Court in Strasbourg upholds the obsolete principle of *Barcelona Traction* builds on appearances more than reality. The subsistence of the corporate veil in Strasbourg is a starting point for judicial analysis rather than a reflection of the actual nature of the Court's response. Individual human rights protection remains a valid consideration, also as far as shareholders' interests are concerned. Effective ECHR protection cannot, however, by default take precedence over macro-economic, political and democratic realities. This insight reflects a profound aspect of Strasbourg jurisprudence.

<sup>107</sup> *Barcelona Traction*, *supra* note 2, Separate Opinion of Judge Fitzmaurice, 65 (§ 5).

